Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
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KSKN Television, Inc.	)	Facility I.D. No. 35606
Licensee of Station KSKN(TV)	)	NAL/Acct. No.: 1041420008
Spokane, Washington	)	FRN: 0006579841

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: May 26, 2010 **Released: May 27, 2010**

By the Commission:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture ("NAL")* issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the "Act"), and Section 1.80 of the Commission's Rules (the "Rules"),[1] we find that KSKN Television, Inc. (the "Licensee"), licensee of Station KSKN(TV), Spokane, Washington (the "Station"), apparently willfully and repeatedly violated Section 73.670 of the Rules, by failing to comply with the limits on commercial matter in children's programming.[2] We also find that the Licensee apparently violated Section 73.3526(e)(11)(iii) of the Rules by failing to publicize the existence and location of its Children's Television Programming Reports.[3] Based upon our review of the facts and circumstances before us, we conclude that the Licensee is apparently liable for a monetary forfeiture in the amount of seventy thousand dollars ($70,000).

II. BACKGROUND

2. In the Children's Television Act of 1990, (the "CTA"),[4] Congress directed the Commission to adopt rules, *inter alia,* limiting the number of minutes of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewal applications the extent to which the licensee has complied with such commercial limits. Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. The Commission stated that a program associated with a product, in which commercials for that product are aired, would be treated as a "program-length commercial," *i.e.*, the entire program would be counted as commercial time.[5] In addition, the Commission reiterated its long-standing policy against "host-selling," *i.e.,* "the use of program talent to deliver commercials," including "endorsements or selling by animated cartoon

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[1] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

[2] *See* 47 C.F.R. § 73.670.

[3] *See* 47 C.F.R. § 73.3526.

[4] Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b and 394.

[5] *Children's Television Programming*, Report and Order, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991).

characters as well as 'live' program hosts."[6]

3. Under the Commission's rules implementing the CTA, each television broadcast station licensee has an obligation to air programming that serves the educational and informational needs of children through both the licensee's overall programming and programming "specifically designed" to educate and inform children (core programming).[7] The Commission's rules require commercial licensees to provide information to the public about the shows they air to fulfill their obligation. Section 73.3526(e)(11)(iii) of the Rules requires each commercial television broadcast station to prepare and place in its public inspection file a Children's Television Programming Report for each calendar quarter reflecting, *inter alia*, the efforts it has made during the quarter to serve the educational needs of children. As set forth in Section 73.3526(e)(11)(iii), licensees are also required to file the reports with the Commission and to publicize for the public the existence and location of the reports.

4. On October 2, 2006, the Licensee filed its license renewal application (FCC Form 303-S) for Station KSKN(TV) (the "Application") (File No. BRCT-20061002BPN). In response to Section IV, Question 5 of the Application, the Licensee stated that, during the previous license term, the Station failed to comply with the limits on commercial matter in children's programming specified in Section 73.670 of the Rules. In Exhibit 19 and in a February 20, 2007, amendment to the Application, the Licensee indicated that during the third and fourth quarters of 2002, and the first quarter of 2003, the Station violated the children's television commercial limits. Specifically, the Licensee stated that on 86 occasions during this period, the Station aired a commercial for the Collector's Zone during the "Yu-Gi-Oh!" 30-minute program. The Licensee stated that this commercial contained a "very brief pictorial and aural reference to Yu-Gi-Oh! trading cards." The Licensee attributed the violations to human error. The Licensee described the remedial measures taken after these incidents to prevent future violations of the commercial limits.

5. In addition, the Licensee indicated that on December 23, 2006, the Station aired a CW Network commercial for Post Cereal's Cocoa Pebbles during the "Xiaolin Showdown" program. According to the Licensee, images from Post Cereal's postopia.com website appeared, including images of the website's navigation bar. The Licensee stated that the navigation bar included pictures of characters from the "Xiaolin Showdown" program. The Licensee maintained that the images of the website were visible for a short period of time and that the images of the characters on the navigation bar were "very small."

6. In response to Section IV, Question 10 of the Application, the Licensee stated that,

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[6] *Id.* at 2127 n.147; *see also* 6 FCC Rcd at 5097; *Action for Children's Television,* 50 FCC 2d 1, 8, 16-17 (1974), *recon. denied*, 55 FCC 2d 691 (1975), *aff'd*, *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977). The term "host-selling" refers to the use of a program host, character, or other program personality to promote products in the program in which he or she appears by, for example, delivering the commercial in his or her character role or commenting on the advertisement in such a manner as to appear to endorse the product (*i.e.*, via a lead-in/lead-out). *Action for Children's Television,* 50 FCC 2d at 16. The Commission has explained that its policy against host-selling "is a special application of our more general policy with respect to separation of commercial and program material," which "is an attempt to aid children in distinguishing advertising from program material [and] requires that broadcasters separate the two types of content by use of special measures such as 'bumpers' (e.g., 'And now it's time for a commercial break,' 'And now back to the [title of the program]')." *Children's Television Programming*, 6 FCC Rcd at 2127 n.147. The Commission has stated that, "[i]n general, a first-time violation of a Commission policy such as host-selling or separation of program and commercial material will result in a letter of admonishment" and that "[v]iolations of our rules regarding program-length children's commercials may be subject to forfeitures." *Id.* An advertisement that violates the host-selling policy could be both a host-selling violation and a program-length commercial if the advertised product is associated with the program in which the advertisement appears.

[7] 47 C.F.R. § 73.671.

during the previous license term, it had failed to publicize the existence and location of the Station's Children's Television Programming Reports, as set forth in Section 73.3526(e)(11)(iii) of the Rules. In Exhibit 24, the Licensee indicated that during preparation of the Application, it determined that it had not publicized the existence and location of the Station's Children's Television Programming Reports. The Licensee reported that the contract providing for the scheduling of on-air announcements regarding the Children's Television Programming Reports had been mistakenly discontinued after the departure of a Station employee. The Licensee stated that as a result, no such announcements were aired between December 2004 and December 2005. The Licensee maintained that upon discovery of this error, it immediately took steps to resume broadcasting regular announcements publicizing the existence and location of the Station's Children's Television Programming Reports.

III. DISCUSSION

7. Station KSKN(TV)'s record during the last license term of exceeding the Commission's commercial limits on 86 occasions, all of which were program-length commercials, constitutes an apparent willful and repeated violation of Section 73.670 of the Rules. Moreover, the Licensee's failure to publicize the existence and location of the Children's Television Programming Reports constitutes an apparent willful and repeated violation of Section 73.3526(e)(11)(iii). The Licensee contended that the commercial for the Collector's Zone contained a "very brief pictorial and aural reference to Yu-Gi-Oh! trading cards." However, it is well-established that the determination as to whether a particular program is a program-length commercial is not dependent on the duration of the appearance of the program-related product in the commercial announcement. The Commission has stated on numerous occasions that, where a commercial announcement includes a product related to the program in which the commercial is broadcast, then the program is a program-length commercial regardless of the duration of the appearance of the program-related product in the commercial.[8] Moreover, we believe that, in the context of the cognitive abilities of young children, there is the potential for confusion between the commercial for the Collector's Zone and the "Yu-Gi-Oh!" program since the commercial contained references to "Yu-Gi-Oh!" trading cards and the consequent likelihood the children may associate it with the program. From the Licensee's description of the "Xiaolin Showdown" commercial, it appears that this incident is more akin to a violation of the Commission's "host-selling" policy, rather than a program-length commercial, because the commercial did not advertise a product associated with the program.

8. Congress was particularly concerned about program-length commercials because young children often have difficulty distinguishing between commercials and programs.[9] Given this congressional concern, the Commission made it clear that program-length commercials, by their very nature, are extremely serious violations of the children's television commercial limits, stating that the program-length commercial policy "directly addresses a fundamental regulatory concern, that children who have difficulty enough distinguishing program content from unrelated commercial matter, not be all the more confused by a show that interweaves program content and commercial matter."[10]

9. The 86 instances in which the Station exceeded the children's television commercial limits represent an extremely high number of violations. Overages of this number and nature mean that

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[8] *UTV of San Francisco, Inc. (KBHK-TV)*, Letter, 10 FCC Rcd 10986, 10988 (1995); *see also WPIX, Inc.,* Letter, 14 FCC Rcd 9077 (MMB 1999) (commercial for "Spirit of Mickey" home video showing brief image of Donald Duck on cover of video aired during "Quack Pack" program); *Act III Broadcasting License Corp. (WUTV(TV))*, Letter, 10 FCC Rcd 4957 (1995), *aff'd*, 13 FCC Rcd 10099 (MMB 1997) (commercial for a fast food restaurant promoting a trip to Disney World as a contest prize contained a brief image of Goofy and aired during the program "Goof Troop").

[9] S. Rep. No. 227, 101st Cong., 1st Sess. 24 (1989).

[10] *Children's Television Programming,* 6 FCC Rcd at 2118.

children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted the Children's Television Act of 1990.[11] Although the Licensee indicated that these overages resulted from human error, this does not mitigate or excuse the violations. In this regard, the Commission has repeatedly rejected human error and inadvertence as a basis for excusing violations of the children's television commercial limits.[12] Furthermore, the Licensee's implementation of policies to prevent subsequent violations of the Commission's children's television rules and policies does not relieve the Licensee of liability for violations which have occurred.[13]

10. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.[14] Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.[15] The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,[16] and the Commission has so interpreted the term in the Section 503(b) context.[17] Section 312(f)(2) of the Act provides that "[t]he term 'repeated,' when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."[18]

11. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of $8,000 for violation of Section 73.670 and a base forfeiture amount of $10,000 for violation of Section 73.3526.[19] In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated in Section 503(b)(2)(D) of the Act, including "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[20]

12. In this case, a base forfeiture amount of $10,000 for violation of Section 73.3526 is appropriate for the licensee's one-year failure to publicize the existence and location of the Children's

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[11] *Children's Television Programming, supra,* 6 FCC Rcd at 2117-18.

[12] *See, e.g., LeSea Broadcasting Corp. (WHKE(TV))*, Letter, 10 FCC Rcd 4977 (MMB 1995); *Buffalo Management Enterprises Corp. (WIVB-TV)*, Letter, 10 FCC Rcd 4959 (MMB 1995); *Act III Broadcasting License Corp. (WUTV(TV))*, Letter, 10 FCC Rcd 4957 (MMB 1995); *Ramar Communications, Inc. (KJTV(TV))*, Letter, 9 FCC Rcd 1831 (MMB 1994).

[13] *See, e.g., WHP Television, L.P. (WHP-TV)*, Letter, 10 FCC Rcd 4979, 4980 (MMB 1995); *Mountain States Broadcasting, Inc. (KMSB-TV)*, Letter, 9 FCC Rcd 2545, 2546 (MMB 1994); *R&R Media Corporation (WTWS(TV))*, Letter, 9 FCC Rcd 1715, 1716 (MMB 1994); *KEVN, Inc. (KEVN-TV)*, Letter, 8 FCC Rcd 5077, 5078 (MMB 1993); *International Broadcasting Corp.*, Memorandum Opinion and Order, 19 FCC 2d 793, 794 (1969).

[14] 47 U.S.C. § 503(b)(1)(B); s*ee also* 47 C.F.R. § 1.80(a)(1).

[15] 47 U.S.C. § 312(f)(1).

[16] *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

[17] *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

[18] 47 U.S.C. § 312(f)(2).

[19] *See Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) *("Forfeiture Policy Statement"), recon. denied,* 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

[20] 47 U.S.C. § 503(b)(2)(D); *see also Forfeiture Policy Statement,* 12 FCC Rcd at 17100-01; 47 C.F.R. § 1.80(b)(4); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section II.

Television Programming Reports. However, an upward adjustment is warranted for violation of Section 73.670 in light of the number and nature of the commercial overages. Accordingly, we find that the Licensee is apparently liable for a forfeiture in the amount of $70,000 for its apparent willful and repeated violation of Sections 73.3526 and 73.670.[21]

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that KSKN Television, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of seventy thousand dollars ($70,000) for its apparent willful and repeated violation of Sections 73.3526 and 73.670.

14. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that, within thirty (30) days of the release date of this *NAL,* KSKN Television, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

15. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank-Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code).

16. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Barbara A. Kreisman, Chief, Video Division, Media Bureau, and MUST INCLUDE the NAL/Acct. No. referenced above.

17. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

18. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.[22]

[21] We think that an admonishment is appropriate for the Licensee's violation of the Commission's host-selling policy.

[22] *See* 47 C.F.R. § 1.1914.

19. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to KSKN Television, Inc., 400 South Record Street, Dallas, Texas 75202, and to its counsel, Kathleen Kirby, Esquire, Wiley Rein LLP, 1776 K Street, N.W., Washington, D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary